United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2548

DOCKET NO. 74-2548

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P/S

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN R. PATTERSON, et al.,

Plaintiffs-Appellees,

- against-

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, et al.,

Defendants-Appellees,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiffs-Appellees,

-against-

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, et al.,

Defendants-Appellees,

DOMINICK VENTRE, FRANK CHILLEMI, GERALD KATZ, et al.,

Intervenors

JAMES V. LARKIN,

Intervenor-Appellant

BRIEF OF DEFENDANT-APPELLEE NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY

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4

back into the chaos from which it has just emerged

TABLE OF CONTENTS

TABLE OF CASES CITED

STATUTES

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PRELIMINARY STATEMENT

This is an appeal by one of the intervenors, Larkin, in which he seeks to reverse an Opinion and Order rendered on September 19, 1974, by United States District Court Judge Lawrence W. Pierce in the United States District Court for the Southern District of New York. In his aforesaid Opinion and Order, Judge Pierce had approved a settlement agreement dated June 27, 1974, in which the plaintiffs, the Defendant Union and the Defendant Employers had all joined and which settled two consolidated actions brought by a class of private plaintiffs and by the United States Attorney for the Southern District of New York on behalf of the Equal Employment Opportunity Commission (hereinafter "EEOC"), pursuant to Title VII of the Civil Rights Act (42 U.S.C. §2000(e), et seq.)

Since the essential facts and background of events leading up to the settlement agreement are adequately stated in Judge Pierce's Opinion and Order dated September 19, 1974 and in the brief submitted to this Court on behalf of EEOC, it is not necessary to burden the Court with a repetitious recital of such facts and chronology. Sufficient it is to confine this brief to a rebuttal of the contentions made by Appellant Larkin in his brief.

ARGUMENT

It is the fundamental contention of the Defendant-Appellee Union that the approval by Judge Pierce in the Court below of the settlement agreement was proper in all respects, in accordance with the requirements and objectives of Title VII of the Civil Rights Act, and should accordingly be affirmed. Conversely, if the settlement agreement is set aside, serious disruption could again affect the industry which is now returning to a state of stability following many months of unsettled labor conditions during the pendency of the Title VII litigation.

As noted by Judge Pierce in his Opinion , the settlement agreement now under attack by Intervenor Larkin was reached by the parties after a four-week trial on the merits of the two consolidated actions. It was preceded by many months of frequent, intensive negotiations and discussions by and among the various parties. Indeed, an earlier tentative settlement agreement had been rejected by a vote of the Union's membership. Following the trial, the present settlement agreement was ratified by the Union membership in a secret ballot.

Prior to his approval of the settlement agreement, Judge Pierce held a hearing on its fairness, adequacy and reasonableness after due notice to the class of plaintiffs noticed

in this law suit. On that same date, he also held a hearing on the legality of the relief provided in the settlement agreement with regard to its impact on the intervenors, including Larkin, all of whom are non-minority "shapers" in the industry. His Opinion reflects that he gave careful consideration to each and every contention raised by Larkin on this appeal - and he properly rejected each such contention.

After noting that the instant settlement agreement sets forth a goal of achieving 25% minority employment in the industry within five years, consistent with the results in Rios v. Enterpr Association Steamfitters Local 638, 501 F. 2d 622 (2nd Cir. 1974) and in U. S. v. Wood, Wire and Metal Lathers International Union, Local No. 46, 471 F. 2d 408 (2nd Cir. 1973), Judge Pierce manifested the thoughtful and careful consideration he gave to the approval of the instant settlement agreement by stating:

> "But, unlike Rios and Wood Wire, this settlement agreement does not merely commit the parties to the future development of a plan to achieve that goal. Instead, it sets forth a plan with great specificity, including variations on the general theme to account for varying circumstances between different employers. Such detail indicates that the plan is the result of hard, serious and good faith negotiations, and that the different pressures, perspectives and interests of the parties have been confronted and already resolved. This serves to increase the Court's confidence that the plan is workable, and can be implemented immediately."

It is axiomatic that a settlement agreement is a compromise involving a "give and take" process in which each party or group settles for less than a "perfect" satisfaction or protection of its respective intents. This is especially true in seniority disputes. The chief characteristic of seniority is that it is relative in nature. The seniority claim of any individual or group necessarily affects adversely the seniority interest of others in the bargaining unit.*

From this standpoint, none of the parties and groups affected by the instant settlement agreement can be ideally satisfied with all of its contents. The Defendant Union encountered considerable difficulty in persuading its membership to accept a settlement agreement. Certainly, the plaintiffs sought more in the relief requested by their complaints. The various Defendant Employers undoubtedly would have preferred less stricture and regulation with respect to employment in their industry and they cannot be pleased with the substantial money damages charged to them in the Final Order and Judgment predicated on the settlement agreement.

In this context, it is not surprising that Intervenor Larkin is displeased with the settlement agreement. However, his disagreement with some of its contents is not a basis for setting

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* See N. Y. Law Journal, December 5, 1974, pp 1, 5, for decision by N. Y. Supreme Court, App. Div., 2d Dept., in Trans World Airlines, Inc. v. State Human Rights Appeals Board, et al, which dramatically illustrates how the correction of past discrimination necessarily affects the seniority standing of others.

it aside. In his Opinion, Judge Pierce asserted that the intervenors will benefit from the settlement agreement. He described these benefits as follows:

> "Most of the provisions of the settlement agreement are applauded by the intervenors, as well they might be. By regulating employment opportunities in the industry, unlocking Group III and Group I, Regular Situations and Union membershi the agreement will operate beneficially for the intervenors as well as the minorities."

There can be no dispute that the Defendant Apellee agent of the Union is the duly recognized/bargaining unit involved in this litigation, including Intervenor Larkin and the other shapers he purports to represent. In this connection, the role of the Unio in fulfilling its duty of fair representation when there are com peting and conflicting seniority interests by members of a bargaining unit was settled by the United States Supreme Court in Humphrey v. Moore, 375 U.S. 335 (1963). The action of the Union in entering into this settlement agreement conforms to the holding in Humphrey v. Moore.

2.

In substance, Intervenor Larkin is attempting improperly in this appeal to convert the instant Title VII law suit into a proceeding under The Labor-Management Relations Act, 41 U.S.C.

§141, et seq, whereby individuals may invoke the unfair labor practice procedures of the National Labor Relations Board to remedy violations of that Act resulting from preferential employment treatment accorded to employees by reason of Union membership. In this regard, the record reflects that Intervenor Larkin and the class of shapers he purports to represent are non-minorities (to the extent that there are minority shapers, they are included in the class represented by the plaintiffs).

In his earlier Opinion and Order of April 30, 1974, in which the appellant and others were permitted to intervene, Judge Pierce strictly limited such intervention to the impact on them of relief granted in this Title VII action involving racial discrimination and expressly excluded any effort by intervenors to enforce such rights as they may have under the National Labor Relations Act for complaints of alleged discrimination on grounds other than those authorized in Title VII. In that connection, he chided some of the intervenors for attempting to utilize the present Title VII proceeding to enforce an NLRB order which involved the Defendant Appellee Union and one of the Defendant Appellee Employers and which has been affirmed by this Court in 1972.

Again, in his Opinion and Order of September 19, 1974, Judge Pierce emphatically excluded the granting of relief to any

of the intervenors which would be based on grounds other than discrimination within the meaning of Title VII. Thus, in rejecting the contention raised again in this appeal by Intervenor Larkin, Judge Pierce cogently concluded:

> "Finally, it must not be forgotten that this is a Title VII case. Such cases, as Judge Frankel has said in Wood, Wire are 'launched by statutory commands, rooted in deep constitutional purposes, to attack the scourge of racial discrimination in employment . . .(a)nd we know that, in addition to the spiritual wounds it inflicts, such discrimination has caused manifold economic injuries, including drastically higher rates of employment and privation among racial minority groups.' United States v. Wood Wire and Metal Lathers International Union, Local Union 46, 341 F. Supp. 694, 699 (S.D.N.Y. 1972). Title VII is an expression of a commitment to correct minority employment discrimination and, hopefully, the vast social consequences that flow from it and afflict the whole of the nation. The statute does not undertake to correct all forms of employment discrimination. Thus, to the extent that what the intervenors seek here is relief equal to that afforded minorities, it has no legal foundation, in this case. Under the law, relief here must be limited to victims of the kind of discrimination prohibited by Title VII. United States v. Bethlehem Steel Corp., supra, 446 F. 2d at 665. There is no evidence and no assertion that the intervenors have been discriminated against on account of race, religion, color, sex, national origin, or because they have made charges, testified, assisted or participated in any enforcement proceedings under Title VII."

3.

Repeatedly, the brief submitted on behalf of Intervenor Larkin in this appeal erroneously informs this Court that

the Court below found that the white shapers he purports to represent have suffered "equally" with minorities the effects of past discrimination. Based on this distorted view, the appellant inappropriately quotes the maxim that "Equality is Equity" and pedantically cites "Pomeroy Eq. Jur. Section 405" as his authority for this assertion. In effect, the appellant offers the specious argument that the Court below should not grant any relief that did not give non-minorities equal treatment with the minorities.

Although the Court below did acknowledge a past history of discrimination against so-called Group III shapers on grounds unrelated to Title VII, it is inaccurate to state that the Court concluded that minorities and non-minorities had "suffered equally" and therefore, that the Court had erred in not granting "equal relief" to the appellant and to the group for which he claims to speak.

Under the guise of seeking "equal relief", the appellant is actually attempting to scuttle the relief accorded to minorities in a Title VII proceeding. Ironic, indeed, is Intervenor Larkin's reference to the stirring words of the recent civil rights song, "We shall overcome". Instead of "Black and white together", he wants the minorities to march <u>behind</u> him on their way to jobs in this industry!

Equally cynical and irresponsible is the appellant's citation of sources dealing with the Nazi destruction of European Jewry as a ground for attack on Judge Pierce's Order approving the instant settlement agreement. Does Intervenor Larkin dare to insinuate that Judge Pierce's decision in the Court below can be compared to the Nazi code in dealing with the "Jewish Question"?

The appellant's pious pretense in quoting from the Bible is absurdly misplaced. It adds neither sanctity nor sanction to his groundless argument on this appeal.

4.

In a futile attempt to bolster his untenable argument that the settlement agreement grants proscribed "super-seniority" to minorities which permits them to "leap-frog" illegally past him and other Group III non-minorities, the appellant inaccurately ascribes the qualities of vested seniority rights of a full-time employee to himself and to those in his class.

Judge Pierce expressly found that Larkin and the Group III class to which he belongs are shapers who "do not have full-time employment, nor do many of them have any great expectations or intention of working full-time while they shape from the Group III list." It is common knowledge in the industry that many of the Group III shapers hold full-time jobs in civil ser-

vice and elsewhere and utilize their status in this industry to supplement their income. This is hardly the type of employment which warrants granting them such a protected status as to shield them from the appropriate relief available to minorities in a Title VII action.

In commenting on a Group III shaper's work expectations, Judge Pierce made the following persuasive analysis:

> "In other words, assessing a shaper's expectation is a highly speculative exercise. The Court does not mean to minimize a Group III member's vested emotional interest in his position at a shape, but it cannot be equated with the worker who might be 'bumped' from a steady and seemingly secure position by an outside minority with less seniority than him. Further, it must be pointed out that even if these shaping priorities were viewed as providing firm expectations, '(such) seniority advantages are not indefeasibly vested rights but mere expectations from a bargaining agreement subject to modification.' United States v. Bethlehem steel Corp., supra, 446 F. 2d at 663."

Moreover, Judge Pierce rejected outright the contention of the intervenors that the settlement agreement was harmful to them. Thus he said:

> "First and dispositive of all the issues raised by the intervenors, the settlement agreement simply does not trample on their employment opportunities. In the long run, it must be acknowledged by all concerned that the effect of this agreement, if it operates as predicted, will be to achieve Regular Situation or Group I status for all members of Group III, minority and non-minority alike, within a relatively short time span. Without this settlement, Group III workers had little if any hope of ever achieving either status under the present system."

After the four-week trial, Judge Pierce made a finding that minority employment in this industry is less than 2%. The parties to the settlement agreement stipulated therein that there is a statistical imbalance within the industry in relation to those individuals defined as minorities in Title VII.

In this connection, Judge Pierce accepted as credible the testimony at the trial of the Union's President that the Union had historically favored employment practices partial to its members and that the Union was not motivated by any intent to discriminate against minorities. Although Judge Pierce described this Union position as "admirable under most circumstance he ruled that "it is the discriminatory effect of practices and policies, not the underlying intent, which is relevant in a Title VII action".

Accordingly, the Defendant-Appellee Union had no choice except to enter into the settlement agreement which gave reasonable protection to its members and to all others in the bargaining unit at the same time that it provided an affirmative action program which fulfills the objectives of Title VII in detailing plans whereby a goal of 25% minority employment in the industry will be reached in five years. To permit Intervenor Larkin and a small group of non-minority shapers for whom he might possibly speak to upset this settlement agreement could only serve to plunge the employment practices of this industry

back into the chaos from which it has just emerged.

6.

In approving the settlement agreement, including its five-year goal of achieving 25% minority employment in the industry, Judge Pierce asserted that "It is this present impact of past practices which justifies the affirmative, corrective relief embodied in the settlement agreement." In so doing he relied on the United States Supreme Court's decision in Griggs v. Duke Power Co., 401 U. S. 424 (1971), as well as on the trilogy of decisions by this Court in Rios, Wood Wire, and Bethlehem Steel, supra. The appellant's efforts to twist the meaning and effect of these decisions in order to defeat the instant settlement agreement should not be upheld by this Court.

CONCLUSION

For the foregoing reasons, this appeal by Intervenor Larkin should be denied in all respects and the Opinion and Order of Judge Pierce in the Court below, dated September 19, 1974, should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE
BY MAIL

I, MICHAEL KLEIN, an attorney for Defendant-Appellee Newspaper and Mail Deliverers Union of New York and Vicinity certify that on the 12th day of December, 1974, I served the attached brief bearing Docket No. 74-2548 upon counsel of record for each of the parties herein by depositing two copies to each said counsel in the United States mail, addressed to each as shown on Exhibit A, annexed hereto, with postage pre-paid.

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